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In the Supreme Court of the United States

October Term, 1984

STATE OF OHIO,
Petitioner,

vs.

CLAUDE CAPONI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Where an Inventory Search Is Initiated Pursuant to Standard Police Policy, an Illegally Concealed Weapon Found During the Inventory Will Not Be Suppressed Because the Police Conducted a Subsequent Investigatory Search After the Weapon Was Found.

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No.

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To the Supreme Court of Ohio

OPINIONS BELOW

The decision of the Supreme Court of the State of Ohio affirming the Ninth District Court of Appeals' decision is reproduced in the Appendix of the Petition at page A1.

The decision of the Court of Appeals for the Ninth District affirming the judgment of the trial court of Summit County is reproduced in the Appendix of the Petition at page A4.

The decision of the Summit County Court of Common Pleas suppressing the evidence is reproduced in the Appendix of the Petition at page A8.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to invoke jurisdiction under 18 U.S.C. §1257(3). The Court of Common Pleas for Summit County on February 24, 1983, suppressed the evidence in this case finding that it was illegally seized under the Fourth Amendment. The decision was affirmed by the Court of Appeals for the Ninth Judicial District on May 18, 1983. The Supreme Court of Ohio affirmed the Court of Appeals' decision on August 1, 1984. Petitioner prays that this Court grant the Writ of Certiorari for the reasons that state courts in the instant case have incorrectly decided important federal questions that must be settled by this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes Involved

O.R.C. §2905.11 Extortion.

O.R.C. §2923.12 Carrying Concealed Weapons.

O.R.C. §2923.13 Having Weapons While Under Disability.

O.R.C. §2923.16 Improperly Handling Firearms In A Motor Vehicle.

See the Appendix of the Petition at pages A13 to A17.

STATEMENT OF THE CASE

On August 23, 1982, the Grand Jury returned an indictment against the respondent charging him with Extortion [O.R.C. §2905.11] and a capias was issued for his arrest. The police suspected another unknown individual of being involved with this crime and the police were hoping to find this second individual before arresting the respondent. On August 27, at approximately 7:00 a.m., Detective Padrutt went to the respondent's house for the first time with the warrant for respondent's arrest. Detective Padrutt conducted a limited surveillance of respondent's home with the expectation of arresting the respondent and his accomplice together. At approximately 12:45 that afternoon, Detective Padrutt was driving by the respondent's house when he saw the respondent and an unidentified individual who matched the description of respondent's accomplice in respondent's car pulling out of the driveway. Detective Padrutt was in an unmarked car. He was unable to follow the respondent because the detective's car was going in the opposite direction when he saw the respondent. At 2:15 p.m., the respondent's car was spotted at the Old Harbor Inn. The police waited outside of the restaurant expecting to arrest the respondent and his accomplice when they exited the restaurant. The respondent exited the restaurant alone and the police went back into the restaurant to search for his accomplice. The search for respondent's accomplice was unsuccessful

and the respondent's car was stopped approximately half a mile from the restaurant. The respondent was served with the capias and arrested.

Lieutenant Newman of the Summit County Sheriff's Office ordered that respondent's car be towed away from the location of the stop. Deputy Hamblin of the Summit County Sheriff's Office radioed the dispatcher to send a tow truck to the location of the arrest. Pursuant to standard policy of the Sheriff's Department, the contents of the respondent's car were inventoried for safekeeping. After opening respondent's locked trunk to inventory the contents, Deputy Hamblin immediately observed respondent's handgun. Deputy Hamblin listed approximately 30 items that were found in respondent's car on a pre-printed Sheriff's "Vehicle Inventory" form. A few of the items that were inventoried were taken out of the car and given to Lieutenant Newman for investigative purposes. These items included an envelope with oil leases, an address book, a white envelope with suspect marijuana, and the gun which was found in the trunk. Deputy Hamblin voluntarily gave these items to Lieutenant Newman because the deputy believed these items might be evidence of a crime that Lieutenant Newman was investigating. Detective Padrutt looked through the contents of envelopes and containers that were seized.

The respondent was subsequently indicted for one count of Having a Weapon Under Disability [Ohio Revised Code §2923.13], one count of Carrying a Concealed Weapon [O.R.C. §2923.12], and one count of Misuse of a Firearm in a Vehicle [O.R.C. §2923.16].

The respondent filed a Motion to Suppress the Evidence found in respondent's car contending that the inventory search was actually a pretextual search to un-

cover evidence. On February 14, 1983, the court granted the respondent's motion to suppress finding the inventory to be an improper search to gather evidence.

On May 18, 1983, the Ninth District Court of Appeals affirmed the trial court's ruling. On September 14, 1983, the Ohio Supreme Court accepted jurisdiction of this case. On August 1, 1984, the Ohio Supreme Court affirmed the lower court's ruling suppressing the evidence. The court held that there was substantial evidence to support the trial court's ruling that the purpose of the inventory search was to gather evidence and not to inventory the contents of the car.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE THE SCOPE OF AN INVENTORY SEARCH WHEN POLICE FIND EVIDENCE OR CONTRABAND DURING THEIR INVENTORY AND EXPAND THEIR SEARCH INTO AN INVESTIGATIVE SEARCH.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976) this court held that an inventory search of a car is proper under the Fourth Amendment where the police follow standard procedures in inventorying the car. However, the inventory search cannot be used as a pretext to conceal an investigative search. *Id.* at 376. Police can inventory packages and their contents as part of the inventory search. *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983). If police find contraband during the inventory search, this search can be expanded into an investigative search based upon probable cause. *Michigan v. Thomas*, 458 U.S. 259 (1982).

Although these cases provide some guidelines concerning the scope of an inventory search, the issue raised by the

State remains unanswered. Where the police expand their inventory search into an investigative search after an illegally concealed weapon is found, must that weapon be suppressed? The State believes that this weapon can be properly admitted into evidence pursuant to the inventory exception to the warrant requirement.

When an inventory search is initiated pursuant to established departmental policy, evidence found during the initial part of the search will not be suppressed because the police failed to properly complete the inventory. *Girardi v. Commonwealth,* 221 Va. 459, 270 S.E.2d 743 (1980), *cert. denied,* 451 U.S. 913 (1981), *Coleman v. State,* 668 P.2d 1126 (Okla. App. 1983), *cert. denied,* 104 S. Ct. 986 (1984), *United States v. Hall,* 565 F.2d 917 (5th Cir. 1978). In *Girardi,* the police inventoried defendant's car pursuant to department regulations and found controlled substances and drug paraphernalia in defendant's gym bag. After finding the drugs, the police removed all of defendant's luggage from the car and took it to the police station for inventory and safekeeping. The police inventoried defendant's luggage but a copy of the inventory was never given to the defendant. The *Girardi* court stated that the contraband was properly discovered even though the scope of the search changed after the contraband was found:

> There is nothing in the record to show that Peralta was required to present an inventory list to Girardi. Peralta testified that when he discovered the contraband drugs in Girardi's luggage he was confronted with a problem more serious than a routine inventory. He therefore transported all the personal property to the police station, delivered the contraband to be inventoried, and inventoried the other personal property himself before depositing it in the property room. He conceded that he did not give an inventory list to

> Girardi. We hold that the evidence supports the trial court's finding that the contraband was discovered during the course of a legitimate inventory search. Interruption or discontinuance of the inventory search upon discovery of the drugs did not invalidate it retroactively. The discovery immediately changed the police function from mere custodial care to the prompt investigation of the felonies thereby revealed.

Id. at 746-747, 221 Va. at 465.

The trial court in this case invalidated the inventory search retroactively by condemning police investigative conduct that occurred after the illegally possessed weapon was found. The trial court never made a factual finding concerning whether the police were inventorying or investigating at the time the weapon was found. This is the essential issue in determining if the inventory search was pretextual.

In *United States v. Bosby*, 675 F.2d 1174 (11th Cir. 1982) the defendants were arrested and their car impounded pursuant to Birmingham, Virginia police policy. Before the car was towed, the arresting officer seized a briefcase from the trunk of defendants' car. He opened the briefcase and looked through its contents before returning the briefcase to defendants' car. The next day after returning the briefcase, the arresting officer inventoried the contents of defendants' car and found incriminating documents. Working independently of local police, federal agents later obtained a search warrant to search the briefcase.

The *Bosby* court held that the arresting officer conducted an illegal search when he seized the briefcase from defendants' car and looked through the contents of the briefcase. *Id.* at 1180. However, this illegal search

did not invalidate the inventory search. The court held that the inventory search was proper and stated that "the mere expectation of uncovering evidence will not vitiate an otherwise valid inventory search." *Id.* at 1179. Further, the court held that evidence found in the briefcase was properly searched pursuant to a search warrant notwithstanding the first illegal search:

> Notwithstanding the illegal search, however, we are unable to conclude that the contents of the briefcase must be suppressed.
>
> Had any of the documents found in the briefcase been admitted at trial as a result of the illegal search, we would not hesitate to suppress the evidence. *See Mapp v. Ohio,* 367 U.S. 643, 660, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961) (adopting exclusionary rule and stating that "we can no longer permit [the Fourth Amendment] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.") The evidence was not, however, obtained from the illegal search. Instead, the evidence was seized pursuant to a valid warrant executed by FBI Agent Grenier. Thus, absent proof that the first, illegal search somehow tainted the second, legal search, the evidence was properly admissible. *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Haddad,* 558 F.2d 968, 975 n.6 (9th Cir. 1977); *United States v. Galante,* 547 F.2d 733, 740 (2d Cir. 1976), *cert. denied, Comeriero v. U.S.,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977).

Id. at 1180-1181.

Applying the principles in *Bosby* to the instant case, the investigative search of respondent's property should not

invalidate Deputy Hamblin's inventory search of respondent's car. Deputy Hamblin conducted two distinct searches. An inventory search that uncovered an illegally possessed weapon and an investigatory search after the weapon was found. Even assuming the second search was illegal, it does not mandate the suppression of evidence that was properly seized during the inventory search.

After police find evidence of a crime or contraband during their inventory search, they should be able to expand their search of that car. Once evidence of a crime is found during an inventory search, an illegal search conducted after the evidence was found should not invalidate the inventory search retroactively. The State urges this court to grant a writ of certiorari in order to determine the scope of an inventory search once evidence is found during the inventory.

CONCLUSION

This case presents a novel issue of law concerning the scope of an inventory search once police find evidence of a crime during their inventory. Since many police departments have adopted inventory procedures, this is a recurring problem which needs to be decided by this Court. The State requests this Court to grant a Writ of Certiorari in the instant case.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 1, 1984)

No. 83-916

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

CLAUDE CAPONI,
Appellee.

[12 Ohio St. 3d 302]

Criminal law—Search and seizure—Search conducted with "investigatory intent" does not constitute "inventory search" and may not be used as pretext for warrantless evidentiary search, when.

O.JUR. 3d CRIMINAL LAW §§ 508, 509.

A search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an "inventory search" and may not be used as a pretext to conduct a warrantless evidentiary search.

APPEAL from the Court of Appeals for Summit County.

This in an appeal from a decision of the court of appeals affirming the granting of a motion to suppress evidence by the court of common pleas.

On August 23, 1982, an indictment was returned against defendant-appellee, Claude Caponi, charging him with extortion. A capias was issued but the arrest was not carried out for several days. On the day of the arrest, Friday, August 27, appellee was kept under surveillance for several hours, but was not arrested until shortly after he entered his automobile and turned onto a public highway. At the scene of the arrest, the police searched appellee's automobile, including the locked trunk, and took several items from the trunk, including a handgun as evidence. The inventory officer acted under the direction of the investigating officers. No search warrant had been issued.

The original indictment was then amended to include charges of having a weapon under disability (R.C. 2923.13 [A][4]); carrying a concealed weapon (R.C. 2923.12); and misuse of a firearm in a vehicle (R.C. 2923.16). Appellee filed a motion to suppress, which was granted by the trial court. The court of appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

J. P. Celebrezze, J. The question to be determined by this appeal is whether the search conducted of appellee's automobile was a valid "inventory search," or rather was an unreasonable and warrantless search in violation of the Fourth Amendment.

In *South Dakota v. Opperman* (1976), 428 U.S. 364, 373, the United States Supreme Court recognized the constitutional validity of police inventory searches "where the process is aimed at securing or protecting the car and its contents." In *State v. Robinson* (1979), 58 Ohio St. 2d 478 [12 O.O.3d 394], this court, in interpreting the *Opperman* decision at 480 stated:

"* * * The court concluded that a routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment *when performed pursuant to standard police practice, and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile. It appears logical to conclude from this that a pretextual search is not an inventory search.*" (Emphasis added.)

In the case *sub judice*, the trial court specifically found that the search bore little resemblance to a standard police inventory search, and that the purpose of the search was to gather evidence and not to take an inventory. These findings were supported by substantial evidence and thus will not be disturbed on appeal.

A search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an "inventory search" and may not be used as a pretext to conduct a warrantless evidentiary search. Accordingly, the evidence in question was seized in contravention of the Fourth Amendment and was properly suppressed.

DECISION AND JOURNAL ENTRY OF THE NINTH JUDICIAL DISTRICT COURT OF APPEALS, SUMMIT COUNTY, OHIO

(Dated May 18, 1983)

C.A. No. 11063

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

STATE OF OHIO,
Plaintiff-Appellant,

v.

CLAUDE CAPONI,
Defendant-Appellee.

DECISION AND JOURNAL ENTRY

This cause was heard May 9, 1983, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, J.

The State of Ohio, plaintiff-appellant, challenges a trial court order suppressing as evidence a gun seized without a search warrant from Claude Caponi's car. We affirm.

On August 23, 1982, the Summit County Grand Jury returned an indictment against Claude Caponi, defendant-appellee charging him with extortion in violation of R.C. 2905.11. A capias was issued for his arrest. The police did not arrest Caponi immediately. Rather, they continued their investigation and surveillance of defendant for several days hoping to obtain information about a second individual suspected of being involved in the crime.

The defendant was finally arrested on August 27, by sheriff's deputies from the organized crime and vice unit. At the time of the arrest, police searched Caponi's car including the locked trunk and took several items including a hand gun from the trunk as evidence. The indictment was subsequently amended to charge one count of having a weapon under disability (R.C. 2923.13(A)(4)); one count of carrying a concealed weapon (R.C. 2923.12); and one count of misuse of a firearm in a vehicle (R.C. 2323.16).

Defendant's pre-trial motion to suppress the evidence obtained from the trunk of his car was granted. Certifying that this appeal is not taken for purposes of delay and that the lower court's ruling has effectively destroyed its prosecution of the subsequent charges, the state contends:

ASSIGNMENT OF ERROR

"The trial court erred in suppressing the gun found in the trunk of defendant's car since this gun was found during a constitutionally permissible inventory search of defendant's car."

Clearly, the police did not have a warrant to search the car. The gun was in the locked trunk of the car and was not within plain view at the time of the arrest. However, the State contends that the gun was discovered incident to a routine inventory search made before towing the vehicle.

In its ruling on defendant's motion, the trial court said:

"* * *.

"The motion to dismiss certain evidence seized from Defendant's car has merit. Although referred to as a 'traffic stop' by the officers, there was no evidence of any traffic law violation by Defendant and the officers conceded as much. It was further conceded that their purpose in searching his car was investigatory, a fact that was plainly borne out by the totality of all the surrounding circumstances. If the search is to be validated, it must be on the theory of an inventory search incident to the necessary impoundment of Defendant's car. The only basis for adopting this theory would be that Officer Hamblin, who searched the car, was doing so solely to make a record of its contents in accordance with departmental policy. At the scene, he was plainly acting under the direction of the investigating officers. He handed over to them some of his discoveries and generally appeared to be motivated to assist them in their purposes. Further, the need for an inventory search was never established. What occurred on that occasion bears little resemblance to a bona fide inventory search. Its purpose was plainly to gather evidence and it was done without authority of law."

"* * *."

The trial judge was the trier of fact, and we find the record contains sufficient evidence to support this finding. Thus, the lower court order comports with South Dakota v. Opperman (1976), 428 U.S. 364; and State v. Robinson (1979), 58 Ohio St. 2d 478. We find no conflict with United States v. Ross (1982), ... U.S. ....., 72 L. Ed. 2d 572.

Accordingly, we overrule appellants' assignment of error. The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ DANIEL P. QUILLIN
Presiding Judge for the Court

QUILLIN, P.J.
BAIRD, J.
concur

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated March 1, 1983)

No. CR 82 8 996

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO,

VS.

CLAUDE CAPONI

JOURNAL ENTRY

THIS DAY, to-wit: The 14th day of February, A.D., 1983, upon due consideration of this Court, and for good cause shown, IT IS HEREBY ORDERED that the Defendant's Motion to Sever and Motion to Suppress herein be GRANTED.

DONALD B. MCFADDEN, *Judge*
Court of Common Pleas
Summit County, Ohio

RULINGS OF THE COURT OF COMMON PLEAS ON DEFENDANT'S MOTIONS

(Filed February 14, 1983)

Case No. CR 82 8 0996

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,
Plaintiff,

vs.

CLAUDE CAPONI,
Defendant.

RULING ON DEFENDANT'S MOTIONS

This matter is before the Court pursuant to three motions by Defendant. He asks that the Court sever Counts II, III and IV of the indictment from Count I; that Counts II, III and IV be dismissed and that certain evidence seized by police and sheriff's deputies be suppressed. An evidentiary hearing was had and thereafter counsel and prosecutor briefed these matters for the Court.

The Court agrees that Counts II, III and IV are misjoined in the indictment with Count I under the mandate of Crim. Rule 8(A). The three counts are dissimilar to Count I and no commonality is apparent in terms of acts, scheme or course of conduct. Since the first court can't be joined with the latter three in a single indictment, the Court is without power to order these to be tried together. Such is forbidden by Rule 13. If it is forbidden to try them together, necessarily they must be tried separately. Rule 14 has no application to the facts of these matters because it is predicated on prior lawful joinder and authorizes

the court to grant appropriate relief when prejudice is apparent. Since there is here no prior lawful joinder, the prejudice question doesn't come into play.

The motion to dismiss is without merit. Even if the grand jury lacks power to amend an indictment, a contention which has not persuaded this Court, the counts contained in the amendment, when severed from the original indictment, become equivalent to a second indictment—which the grand jury clearly had power to return.

The motion to dismiss certain evidence seized from Defendant's car has merit. Although referred to as a "traffic stop" by the officers, there was no evidence of any traffic law violation by Defendant and the officers conceded as much. It was further conceded that their purpose in searching his car was investigatory, a fact that was plainly borne out by the totality of all the surrounding circumstances. If the search is to be validated, it must be on the theory of an inventory search incident to the necessary impoundment of Defendant's car. The only basis for adopting this theory would be that Officer Hamblin, who searched the car, was doing so solely to make a record of its contents in accordance with departmental policy. At the scene, he was plainly acting under the direction of the investigating officers. He handed over to them some of his discoveries and generally appeared to be motivated to assist them in their purposes. Further, the need for an inventory search was never established. What occurred on that occasion bears little resemblance to a bona fide inventory search. Its purpose was plainly to gather evidence and it was done without authority of law.

The motions to sever and to suppress shall be granted and the motion to dismiss denied. The prosecutor will submit an appropriate entry.

JUDGE DONALD B. MCFADDEN

ORDER OF THE SUPREME COURT OF OHIO

(Dated August 1, 1984)

No. 83-916

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

CLAUDE CAPONI,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons stated in the opinion filed herein.

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

MANDATE OF THE SUPREME COURT OF OHIO TO THE COURT OF COMMON PLEAS

(Dated August 1, 1984)

No. 83-916

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

CLAUDE CAPONI,
Appellee.

MANDATE

To the Honorable Court of Common Pleas Within and for the County of Summit, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons stated in the opinion filed herein.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

OHIO REVISED CODE

§ 2905.11 Extortion.

(A) No person, with purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act, shall do any of the following:

(1) Threaten to commit any felony;

(2) Threaten to commit any offense of violence;

(3) Violate section 2903.21 or 2903.22 of the Revised Code;

(4) Utter or threaten any calumny against any person;

(5) Expose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, or to damage his personal or business repute, or to impair his credit.

(B) Whoever violates this section is guilty of extortion, an aggravated felony of the third degree.

(C) As used in this section, "threat" includes a direct threat and a threat by innuendo.

§ 2923.12 Carrying concealed weapons.

(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance.

(B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of their duties.

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon his home, such as would justify a prudent man in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in his own home.

(4) The weapon was being transported in a motor vehicle for any lawful purpose, and was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable requirements of division (C) of section 2923.16 of the Revised Code.

(D) Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of any offense of violence, or if the weapon involved is a firearm which is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, then carrying concealed weapons is a felony of the third degree. If the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons is a felony of the second degree.

§ 2923.13 Having weapons while under disability.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession,

use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

§ 2923.16 Improperly handling firearms in a motor vehicle.

(A) No person shall knowingly discharge a firearm while in or on a motor vehicle.

(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle, in such manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless it is unloaded, and is carried in one of the following ways:

(1) In a closed package, box, or case;

(2) In a compartment which can be reached only by leaving the vehicle;

(3) In plain sight and secured in a rack or holder made for the purpose;

(4) In plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action

will not stay open or which cannot easily be stripped, in plain sight.

(D) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry or have loaded or accessible firearms in motor vehicles, and acting within the scope of their duties.

(E) The affirmative defenses contained in division (C) (1) and (2) of section 2923.12 of the Revised Code are affirmative defenses to a charge under division (B) or (C) of this section.

(F) Whoever violates this section is guilty of improperly handling firearms in a motor vehicle. Violation of division (A) or (B) of this section is a misdemeanor of the first degree. Violation of division (C) of this section is a misdemeanor of the fourth degree.

(G) As used in this section, "unloaded" means, with respect to a firearm employing a percussion cap, flintlock, or other obsolete ignition system, when the weapon is uncapped, or when the priming charge is removed from the pan.

CORRECTED COPY

Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS
Clerk

(3)

Case No. 84-702

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

STATE OF OHIO,
Petitioner,
vs.
CLAUDE CAPONI,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Respondent submits that the Question Presented in Petitioner's Petition for a Writ of Certiorari is a non-issue in the present case because the opinions and the judgments delivered in the courts below have found that the search involved at no time constituted an inventory search.

The Question Presented herein should properly be: Where an alleged inventory search was merely a pretext for an evidentiary search, was evidence which was gathered at that time properly suppressed?

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STATEMENT OF THE CASE

Respondent would respectfully supplement the Statement of the Case rendered by Petitioner in several respects:

The indictment was returned against Respondent on August 23, 1982, with the capias directing the officers to arrest Respondent without unnecessary delay pursuant to the mandate of Rule 4(E)(1), Ohio Rules of Criminal Procedure. Although there is a special division within the sheriff's department whose duty and obligation it is to serve warrants handed down by the Summit County Grand Jury, the arrest warrant was not referred to the warrant division, but was held by the organized crime and vice unit of the sheriff's department, who even as of the date of the arrest, was still investigating the circumstances underlying the indictment against Respondent. It is important to note that the organized crime division of the sheriff's department is a broad investigative unit, who for admittedly investigatory reasons did not attempt to make the arrest until Friday August 27, 1982. No evidence was presented by the Petitioner to explain the failure of the vice squad to serve the warrant other than the statement that it was done for investigative reasons. On the day of the arrest, Deputy Padrutt arrived at Respondent's house in the adjoining County of Portage at 7:00 a.m. and conducted surveillance. Deputy Padrutt was in the area of Respondent's house from approximately 7:00 a.m. until 12:30 p.m., but at no time made an effort to serve the warrant on Respondent, although he freely admitted that he could have arrested the Respondent in the driveway of his own home, thereby eliminating the necessity of having to impound Respondent's motor vehicle.

After purposely failing to arrest Respondent when presented with a reasonable opportunity to do so, Deputy Padrutt attempted to follow Respondent for the purpose of conducting further surveillance and investigation. Respondent was next seen at a public restaurant where again the police failed to serve the arrest warrant even as Respondent was exiting the restaurant. The car was at the

time located in a restaurant parking lot open to the public. The police waited until Respondent got into his car and stopped Respondent within a short distance of the restaurant. Nobody present at the time of Respondent's arrest was a member of the sheriff's department warrant division.

Although the investigating detective labeled the arrest a traffic stop, there was no evidence that the Respondent had violated any traffic laws. After Respondent was stopped, he was handcuffed and removed from his car to a sheriff's vehicle, at which time a number of Summit County police officers commenced a systematic and thorough search of the interior of Respondent's automobile as well as the contents of a closed glove compartment and locked trunk. Respondent was never given an opportunity to make arrangements to have the car transported or property secured. One of the officers, Deputy Hamblin, was called to the scene pursuant to the direct orders of the vice squad, specifically Lieutenant Newman. Newman was in charge, and he directed and supervised not only the arrest of the Respondent but the "inventory" search as well.

That the investigating detectives intended to search Respondent's car and/or wait until he was in his car to make the arrest is best demonstrated by the fact that Deputy Hamblin, the inventory officer, was initially called at 2:45 p.m. and asked to stand by; yet, the Respondent was not arrested until almost an hour later at 3:40 p.m. The record reflects that the police searched Respondent's car in its entirety, removing the contents of closed envelopes, closed brief cases, address books, telephone books and sealed envelopes; the Respondent's wallet and its contents were also searched—not as a part of the booking process but in a search for evidence. Personal papers of Respondent were even subsequently delivered to the Federal Bureau of Investigation. In fact, the car itself was also seized as evidence by Lieutenant Newman and taken to the Summit County Sheriff's Department where a hold was placed on it. Deputy Hamblin admitted at the hearing that an inventory search was only "standard" when an automobile was to be towed to a private commercial lot. The trial court best

summarized what transpired as "not a bona fide inventory" but "an evidentiary search".

The record is rather vague as to what in fact the standards of the sheriff's department are regarding inventories, since the deputies were unable to tell the trial court whether or not there are written standards.

The Summit County Court of Common Pleas granted Respondent's Motion to Suppress the Evidence, specifically finding that the purpose of the police during the search was investigatory, a fact that was plainly borne out by the totality of the surrounding circumstances. This factual finding that the search was for evidentiary, not inventory, purposes was later affirmed by both the Ninth District Court of Appeals and the Ohio Supreme Court.

SUMMARY OF THE ARGUMENT

This Petition for a Writ of Certiorari should be denied because consideration by the United States Supreme Court of this case will not aid in determining the scope of an inventory search once police find evidence of a crime during their inventory. The present case is wholly unsuitable for the determination of this issue because the opinions and judgments of the courts below have made a factual finding that the search herein was **not** an inventory search; rather, it was merely a pretext for an evidentiary search.

Since it has been determined that the police herein conducted an evidentiary, or investigatory, search, as opposed to an inventory search, then Petitioner's argument as to the scope of an inventory search is inapplicable to the present case. As such, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

The Question Presented in the Petition for a Writ of Certiorari is based upon the false presumption that this case involves a valid inventory search which was later expanded into an evidentiary search. However, the facts, as well as the opinions and judgments of the courts below simply do not support such a presumption. The search involved herein was at no time merely a routine inventory of an automobile which was lawfully impounded. To the contrary, the investigatory purpose so permeated this search from the outset that it was held to be entirely evidentiary in nature. This search was best summarized by the trial court which, after a thorough review of the totality of the surrounding circumstances, held that "[w]hat occurred on that occasion bears little resemblance to a bona fide inventory search. Its purpose was plainly to gather evidence and it was done without authority of law."

In **South Dakota v. Opperman**, 428 U.S. 364 (1976), this Court held that inventory searches are permissible **only** when not utilized as an evidentiary search. It is the non-investigative police inventory of automobiles to which warrant requirements are inapplicable. **Supra** at fn. 5. The Ohio Supreme Court has interpreted **South Dakota v. Opperman**, and has held:

> "...*a routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment when performed pursuant to standard police practice,* ***and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile. It appears logical to conclude from this that a pretextual search is not an inventory search. Ohio v. Robinson****, 58 Ohio St. 2d 478 (1979), (emphasis added).*

The trial court below found that the surrounding circumstances clearly demonstrated that the procedure involved herein was merely a pretext for what was in

actuality an evidentiary search. The trial court thus properly suppressed **all** evidence obtained during the search because the **entire** search was evidentiary in nature.

Petitioner, however, simply refuses to accept this factual determination and attempts to subvert the trial court finding by misinterpreting it in such a way as to suggest that the search herein began as an inventory search and later developed into an evidentiary search. Such an interpretation, however, is clearly in opposition to the opinions and judgments of the courts below. The trial court found the purpose of the search investigatory from the outset. The Ninth District Court of Appeals affirmed this holding and stated that "[t]he trial judge was the trier of fact, and we find the record contains sufficient evidence to support this finding." The Ohio Supreme Court likewise affirmed and specifically held that "[a] search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an "inventory search" and may not be used as a pretext to conduct a warrantless evidentiary search."

Thus, since the search herein was evidentiary from the outset, it was clearly impermissible under **South Dakota v. Opperman** as an unwarranted intrusion upon the Respondent's Fourth Amendment rights.

Further, since this was an evidentiary search, Petitioner's reliance on **Girardi v. Commonwealth**, 221 Va. 459, 270 S.E. 2d 743 (1980) and **United States v. Bosby**, 675 F. 2d 1174 (11th Cir. 1982) is clearly misplaced. **Girardi v. Commonwealth** concerned contraband that was discovered during the course of a legitimate inventory search. However, the case at hand does not involve a legitimate inventory search, and therefore the **Girardi** holding is inapplicable. The trial court herein did not, as Petitioner suggests, invalidate an inventory search retroactively by condemning police investigative conduct that occurred after the illegally possessed weapon was found. The trial court **did** find that the investigative conduct of the police permeated the search from the outset, and thus properly suppressed all evidence obtained therein.

United States v. Bosby is likewise inapplicable due to factual distinctions. However, even the **Bosby** court recognized that inventory searches must be limited to the effectuation of the recognized purposes for which they are conducted and they may not be used as a pretext for intrusive investigatory searches that would otherwise be impermissible. **Supra** at 1179. This is the same rationale applied herein by the courts below to find this to be an evidentiary search.

Therefore, since it has already been determined that the search herein was evidentiary from the outset, then the Question Presented by the Petitioner is clearly a non-issue in the case at hand. As such, since this case does not concern the scope of an inventory search, Respondent respectfully requests this Court to deny a Writ of Certiorari in the present case.

CONCLUSION

This case does not, as Petitioner suggests, present a novel issue of law concerning the scope of an inventory search once police find evidence of a crime during their inventory. It has clearly and consistently been established that the search involved herein was merely a pretext for an evidentiary search. Therefore, the evidence obtained therein was properly suppressed.

As such, since the Question Presented by Petitioner is a non-issue in the case at hand, Respondent respectfully requests this Court to deny a Writ of Certiorari in the present case.

Respectfully submitted,

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